IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 27, 2009

STATE OF TENNESSEE v. COREY SENSABAUGH

Appeal from the Criminal Court for Sullivan County
No. S54,814 Robert N. Montgomery, Jr., Judge

No. E2009-00958-CCA-R3-CD - Filed November 18, 2009

The defendant, Corey Sensabaugh, pleaded guilty in the Sullivan County Criminal Court to six counts of the sale of .5 grams or more of cocaine, a Class B felony, *see* T.C.A. § 39-17-417(a), (c)(1) (2006); six counts of the delivery of .5 grams or more of cocaine, a Class B felony, *see id.*; one count of the sale of methylenedioxymethamphetamine ("MDMA"), a Class B felony, *see id.* § 39-17-417(b); and one count of the delivery of MDMA, a Class B felony, *see id.*, in exchange for an effective sentence of 10 years with the manner of service of the sentence to be determined by the trial court. The trial court ordered a fully incarcerative sentence, and the defendant appeals, claiming the trial court erred by denying probation or other alternative sentencing. Discerning no error, we affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JOHN EVERETT WILLIAMS, J., joined.

Teresa Murray Smith, Blountville, Tennessee (on appeal), and Richard Hopson, Kingsport, Tennessee (at trial), for the appellant, Corey Sensabaugh.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; H. Greeley Wells, District Attorney General; and Kent Chitwood, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On February 5, 2009, the defendant entered his pleas as described above, and the trial court merged each conviction of the delivery of a controlled substance into its corresponding conviction of the sale of a controlled substance. The State summarized the facts of the offenses as follows:

> The State's proof with regard to Case No. S54,814 would be that, and all these are individually packaged here, and all of this has been turned over to the defense, with regard to Counts One through Twelve the State would . . . prove that on the dates listed in the presentment that cocaine was in fact sold from the defendant to an informant. All of these were controlled buys monitored by law enforcement and the State would introduce that proof from law enforcement of the controlled buys prior to each of these sales or deliveries. The informant was searched, wired and given monies to conduct the drug transaction. Afterwards the drugs were taken from the informant, sent to the Tennessee Bureau of Investigation and in each case it did amount to over .5 gram[s] of cocaine. Most of the cases, it would be a larger amount such as 17 grams but none were over 26 grams.
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> With regard to Counts Thirteen and Fourteen, it was the same procedure, informants working with law enforcement did purchase Methylenedioxymethamphetamine from the defendant on the date listed in the presentment; that being a Schedule I controlled substance. This was June 3rd, 2006. The informant had been searched, wired, this was a controlled buy monitored by law enforcement. . . . All of the events or counts listed in the presentment, S54,814 did occur in Sullivan County and all of those I believe occurred in the City of Kingsport as well.

The trial court accepted the plea agreement, which provided for a sentence of 10 years for each conviction, and, pursuant to the plea agreement, ordered that the sentences for the cocaine convictions be served concurrently to each other and consecutively to the 10-year Department of Correction sentence in case number S54,280. Also, pursuant to a last-minute agreement between the parties, the court ordered the 10-year sentence for the MDMA conviction to be served concurrently to both the cocaine convictions in case number S54,814 and the 10-year sentence in case number S54,280.

Neither party presented live testimony at the February 27, 2009 sentencing hearing, choosing to rely instead on the presentence report, a toxicology report, and the arguments of counsel. According to the presentence report, the 23-year-old defendant admitted that he began selling drugs at age 17 because he "could make more in an hour than in a week working." He informed the preparer of the report that he was "consumed" with the "fast money" and the "whole lifestyle" that attended his "hustling." He stated that he sold drugs to support a $400 to $500 per day Oxycontin addiction and to provide gifts for his family. The defendant had two previous convictions of marijuana possession and no verifiable work history aside from a brief stint in 2004 as a plumber's helper. The official agency version of the offenses in the presentence report established that the defendant sold 6.8 grams of cocaine relative to count one, 10.7 grams relative to count two, 13.0

grams relative to count three, 24.8 grams relative to count four, 13.3 grams relative to count five, and 17.5 grams relative to count six. A toxicology report entered into evidence established that the defendant tested positive for benzodiazepines, marijuana, methadone, oxycodone, and oxymorphone on the day he entered into his guilty pleas.

At the conclusion of the hearing, the trial court determined that the defendant had a history of criminal convictions and criminal behavior that warranted enhancement of his sentence. The court also concluded that the defendant was a leader in the commission of the offenses. In mitigation, the trial court found that the defendant showed "genuine sincere remorse." The trial court determined that because of the large amount of drugs sold by the defendant over an extended period of time, "confinement is necessary to protect society by restraining the defendant with a long history of criminal conduct." The court also found that the State had already mitigated the sentence "to a certain degree" through the plea agreement. The court declared the offenses in this case "severe" given "the drug use and abuse in this community." Finally, the court observed that the defendant had a "criminal history demonstrating a clear disregard for the laws and morals of society" and noted that "even while he was out on the bond in this case . . . he continued to violate the law and frankly he lied to the probation officer." Based upon these findings, the trial court ordered a fully incarcerative sentence.

On March 24, 2009, the defendant moved the trial court to reconsider its denial of probation and alternative sentencing. Following a brief hearing on April 23, 2009, at which no evidence was presented, the trial court denied the motion to reconsider. The defendant filed a notice of appeal on May 14, 2009.

In this appeal, the defendant contends that the trial court erred by ordering a fully incarcerative sentence. The State argues that incarceration was appropriate.

Initially, we note that the defendant filed his notice of appeal some two and one half months after the trial court entered the judgments in this case, far outside the 30-day time limit prescribed by Rule 4 of the Tennessee Rules of Appellate Procedure. *See* Tenn. R. App. P. 4(a) ("In an appeal as of right to the . . . Court of Criminal Appeals, the notice of appeal required by Rule 3 shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from . . . ."). Although the defendant filed a Motion to Reconsider within 30 days of the entry of the judgments, such a motion does not toll the time period for filing a notice of appeal in this court. *See* Tenn. R. App. P. 4(c) ("In a criminal action, if a timely motion or petition under the Tennessee Rules of Criminal Procedure is filed in the trial court by the defendant: (1) under Rule 29(c) for a judgment of acquittal; (2) under Rule 32(a) for a suspended sentence; (3) under Rule 32(f) for withdrawal of a plea of guilty; (4) under Rule 33(a) for a new trial; or (5) under Rule 34 for arrest of judgment, the time for appeal for all parties shall run from entry of the order denying a new trial or granting or denying any other such motion or petition."). In consequence, the time for filing a timely notice of appeal expired 30 days from the entry of judgment on February 27, 2009. In criminal cases, however, "the 'notice of appeal' document is not jurisdictional and the filing of such document may be waived in the interest of justice." *See* Tenn. R. App. P. 4(a). Given

the length of incarceration in this case, the interest of justice warrants waiver of the timely filing of the notice of appeal.

When considering a challenge to the manner of service of a sentence this court conducts a de novo review with a presumption that the determinations of the trial court are correct. T.C.A. § 40-35-401(d) (2006). Our case law has long held that the presumption of correctness "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Carter*, 254 S.W.3d 335, 345 (Tenn. 2008) (quoting *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991)). The appealing party, in this case the defendant, bears the burden of establishing impropriety in the sentence. T.C.A. § 40-35-401, Sentencing Comm'n Comments; *see also Carter*, 254 S.W.3d at 344; *Ashby*, 823 S.W.2d at 169. If our review of the sentence establishes that the trial court gave "due consideration and proper weight to the factors and principles which are relevant to sentencing under the Act, and that the trial court's findings of fact . . . are adequately supported in the record, then we may not disturb the sentence even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In the event the record fails to demonstrate the required consideration by the trial court, appellate review of the sentence is purely de novo. *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination in the present case, the trial court, at the conclusion of the sentencing hearing, was obliged to determine the propriety of sentencing alternatives by considering:

> (1) The evidence, if any, received at the trial and the sentencing hearing;
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> 2) The presentence report;
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> (3) The principles of sentencing and arguments as to sentencing alternatives;
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> (4) The nature and characteristics of the criminal conduct involved;
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> (5) Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114;
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> (6) Any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and
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> (7) Any statement the defendant wishes to make in the defendant's own behalf about sentencing.

T.C.A. § 40-35-210(b). The trial court should also consider "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant . . . in determining the sentence alternative or length of a term to be imposed." *Id.* § 40-35-103(5).

Having pleaded guilty to a Class B felony, the defendant is not considered to be a favorable candidate for alternative sentencing. *Id.* § 40-35-102(6). Moreover, because, in this instance, the sentence imposed is ten years or less, the trial court was required to consider probation as a sentencing option. *See* T.C.A. § 40-35-303(a)-(b). Sentencing issues are to be determined by the facts and circumstances made known in each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

When examining a defendant's suitability for an alternative sentence, the trial court should consider whether:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

T.C.A. § 40-35-103(1)(A)-(C). In addition, a defendant's potential for rehabilitation or lack thereof should be examined when determining if an alternative sentence is appropriate. *Id.* § 40-35-103(5).

The defendant is required to establish his "suitability for full probation." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see* T.C.A. § 40-35-303(b); *State v. Bingham*, 910 S.W.2d 448, 455-56 (Tenn. Crim. App. 1995), *overruled in part on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000). A defendant seeking full probation bears the burden of showing that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990) (quoting *Hooper v. State*, 297 S.W.2d 78, 81 (1956)), *overruled on other grounds by Hooper*, 29 S.W.3d at 9-10. Among the factors applicable to probation consideration are the circumstances of the offense; the defendant's criminal record, social history, and present condition; the deterrent effect upon the defendant; and the best interests of the defendant and the public. *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978).

Here, the defendant admitted dedicating his entire adult life to the sale and distribution of cocaine and other drugs. He candidly acknowledged that the illegal drug trade supplied his only source of income and acknowledged the impact of drugs on his community. The defendant himself contributed to the black-market exchange of prescription pain killers by

purchasing approximately $500 worth of these drugs on a daily basis. The agency version of the offenses confirms that in the span of one week the defendant sold cocaine to a confidential informant four times in ever-increasing quantities totaling eventually more than 68 grams. In six weeks' time, the defendant had sold nearly 75 grams of cocaine to the confidential informant. In addition to the cocaine, the defendant sold 12 MDMA tablets, commonly referred to as "Ecstacy," which is a Schedule I controlled substance. The record also establishes that although the defendant claimed to have stopped abusing drugs before his indictment, he tested positive for the use of five different drugs on the day he entered his guilty pleas in this case. The record clearly supports the trial court's conclusion that the defendant possessed a "criminal history demonstrating a clear disregard for the laws and morals of society." In addition, the record supports the trial court's conclusion that "confinement is necessary to protect society by restraining the defendant with a long history of criminal conduct." We also agree with the trial court that the defendant had already been granted leniency in the structure of the plea agreement. *See State v. Dwayne Anthony Dixon*, No. E2007-02237-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App., Knoxville, Aug. 26, 2008) ("A sentencing court may consider a defendant's enjoyment of leniency . . . in awarding or rejecting alternative sentencing options."). Given the defendant's long history of criminal activity and the exaggerated nature of the criminal conduct in this case, the trial court did not err by ordering a fully incarcerative sentence in this case.

Accordingly, the judgments of the trial court are affirmed.

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JAMES CURWOOD WITT, JR., JUDGE